

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

ePLUS, INC. : Civil Action No.
vs. : 3:09CV620
LAWSON SOFTWARE, INC. : September 15, 2011

COMPLETE TRANSCRIPT OF THE CONFERENCE CALL
BEFORE THE HONORABLE ROBERT E. PAYNE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

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P R O C E E D I N G S

THE COURT: Hello. This is ePlus against Lawson, civil 3:09CV620. Who is here for whom?

MR. MERRITT: Craig Merritt, Your Honor, for ePlus.

MR. ROBERTSON: Scott Robertson and Michael Strapp with Goodwin Procter --

THE COURT: Run that up the flagpole again and get closer to the microphone.

MR. ROBERTSON: It's Scott Robertson, Your Honor, from Goodwin Procter with Michael Strapp. My other partner, Jennifer Albert, may be joining us a little late. She's on another conference call, but she might have something to add, so I apologize if she jumps in a little after this call.

MR. CARR: Dabney Carr at TroutmanSanders for Lawson Software. Will Schultz and Kirstin Stoll-DeBell from Merchant & Gould are also both on. Dan McDonald could not be on the call. He is out of the country right now.

THE COURT: Somebody driving in a car have the wind blowing in their hair or something?

MR. CARR: That's me, and I'm going to put my phone on mute now.

THE COURT: Okay. You say in your motion, ePlus, that the opposition is due on Monday, the 19th, and your reply is due on Thursday, the 22nd, but I don't know what that

1 represents agreement to. That represents agreement to what, to
2 what aspect of this whole motion? In other words, should I go
3 on and review the papers and, on the basis of the papers, issue
4 or not issue -- that I have now issue or not issue a show cause
5 order and then set the briefing schedule here according to you,
6 or do I wait? What is it you all are proposing here?

7 MR. ROBERTSON: Yes, thank you, Your Honor. This is
8 Scott Robertson, and let me thank you for taking this hearing
9 so quickly. I know you've been busy, I see, right up until
10 yesterday with respect to other matters, so all parties
11 appreciate this.

12 Specifically what we're seeking, Your Honor, is an
13 order to show cause and permit us to go further and take
14 discovery in order to establish what we believe is the case
15 that Lawson is in contempt of the Court's injunction.

16 I have and I can propose a specific schedule for
17 moving forward with what we would suggest is limited discovery.
18 We've had some informal discovery. As the papers show, we've
19 taken some -- we've received some voluntary production
20 concerning the alleged design-around product, and we did go and
21 view a demonstration which we felt was inadequate.

22 There's been some correspondence with respect to
23 that. We had to travel to St. Paul, Minnesota to do it. We
24 weren't able to fully vent the functionality that we had asked
25 to be prepared, the same as we had for trial. We wanted to do

1 it over the internet by a WebEx presentation. We were told
2 that couldn't be done, but when we arrived there, there was
3 outside counsel for Lawson viewing it by WebEx.

4 So we've incurred some costs, Your Honor, but this
5 is, to us, a very serious matter of what we think is a
6 violation of the injunction, and we think we've made our prima
7 facie case in our papers with our declarations, and so what we
8 would expect is, if the Court deems necessary, unless Lawson
9 wants to concede that we've made our prima facie case and
10 further briefing is unnecessary and we can move forward with
11 the limited discovery we want, we would ask that Lawson respond
12 by Monday, which we thought we had achieved agreement on, and
13 that we would reply three days later, and then the Court could
14 determine whether, under the *TiVo*® case, we had established our
15 prima facie basis such to warrant further investigation as to
16 whether there's a violation of the injunction.

17 THE COURT: So this schedule to which Lawson has
18 agreed is a schedule to oppose the issuance of a show cause
19 order on the 19th; is that right, Mr. Schultz?

20 MR. SCHULTZ: That is correct, Your Honor.

21 THE COURT: Well, now, what would happen if I were to
22 get your filing on the 19th and then get your brief on the
23 22nd? What do you see happening after that, Mr. Robertson?

24 MR. ROBERTSON: Well, here's what I would
25 contemplate, Your Honor, and that is, we have some discovery

1 that we would propose, formal discovery, serving. We'd like to
2 have that expedited. I could actually provide the Court a
3 draft that, say, tomorrow by noon, just so the Court could
4 review it and determine whether or not it was appropriate. Of
5 course I would provide it to Mr. Schultz as well.

6 We then propose expedited response by September 30.
7 Assuming the production is adequate and complete, we move
8 forward. If it's not, I would ask that perhaps we build into
9 the schedule some sort of discovery letters that are a day
10 apart that say the discovery was inadequate and here's why, or
11 the discovery needs to be supplemented and here's why.

12 I would then anticipate a shortened period for
13 depositions. We've asked for one 30(b)(6) and perhaps two
14 individual depositions. Mr. Hager, who the Court may recall
15 testified during -- as a representative for Lawson during the
16 injunction hearing, has made several statements that we think
17 are inconsistent with his sworn testimony during the
18 injunction. I certainly want to take his deposition.

19 We were contemplating that on a shortened schedule,
20 say, perhaps, between October 3rd and October 14th, and then we
21 would ask for briefing on the contempt --

22 THE COURT: All right, hold on just a minute.

23
24 (Discussion off the record.)
25

1 THE COURT: All right. So how long do you think all
2 that will take? Hello?

3 MR. ROBERTSON: Yes.

4 THE COURT: Can you hear me?

5 MS. STOLL-DeBELL: Yes.

6 MR. SCHULTZ: Yes.

7 THE COURT: How long do you think all that would
8 take?

9 MR. ROBERTSON: Well, obviously, ePlus wants to do it
10 on the most expedited basis possible. I'm willing to try to
11 work something out, but given that we're at September 15th,
12 Your Honor, serving discovery, expedited responses, and -- I'll
13 be at the Court's discretion as to what you want to do, but I
14 would think we'd have to brief it after the discovery period.

15 Even on an expedited basis, I see, you know, if we're
16 towards the middle to end of October to get the information in
17 front of the Court, and then we would request a hearing at the
18 Court's earliest convenience.

19 MR. SCHULTZ: Your Honor, this is Mr. Schultz. May I
20 have an opportunity to talk about the discovery?

21 THE COURT: Yes.

22 MR. SCHULTZ: Mr. Strapp and I spoke about this
23 discovery last week. We had also a discussion about that last
24 night. In fact, Lawson proposed to ePlus a proposed discovery
25 that went along with what they requested in their brief. That

1 included a 30(b)(6) deposition, two individual depositions,
2 depositions of Lawson's experts as well as ePlus's experts.

3 These are all things that the parties both agreed on
4 as well as interrogatories and document requests. The parties
5 both agreed to go forward with that. The question is the
6 reasonableness of those, Your Honor.

7 Our position on that is a 30(b)(6) deposition should
8 be limited to eight hours and that the two individual
9 depositions should be limited to four hours apiece. In
10 addition, the interrogatories, we want to limit that to five
11 interrogatories and document requests of five interrogatories.

12 I was kind of surprised this morning when I received
13 an email from Mr. Strapp just stating that the proposal that we
14 provided was unacceptable without a further conversation from
15 Mr. Strapp. I think we could have worked the matter out, but
16 we're very close, Your Honor. It's just a matter of the
17 reasonableness of the discovery requests.

18 In addition, our proposal here was to have the
19 written discovery back by October 7th, which is basically a
20 week after what ePlus had wanted which was September 30th. The
21 reason I think that's appropriate, Your Honor, is we're in
22 briefing right now on a very short schedule here of this motion
23 that ePlus has that we agreed to expedite that to Monday.

24 We shouldn't be short-tripped here based on our
25 responsive motion here, so I think October 7th is adequate, and

1 we're okay with the deposition schedule. Basically, Your
2 Honor, we're agreeing to what ePlus is wanting here. We just
3 want it to be reasonable.

4 MR. ROBERTSON: This is Mr. Robertson. Let me
5 respond to that. First, we got this proposal from you, Will,
6 at 7:00 p.m. last night, and I guess, you know, I want to be
7 fair, but it's ironic, to say the least, that the putative
8 contender is telling us the scope of the discovery we want.

9 We didn't agree to five interrogatories. We didn't
10 agree to five document requests. I think our document requests
11 are 15, and our interrogatories are about 12. If I can limit
12 them, I will. In fact, what I'm really willing to do is, I
13 don't want to waste the time and money to have to go depose
14 experts again.

15 We know what the experts are saying. They're giving
16 depositions. I think, you know, when the Judge sees all the
17 briefing and then we move forward on the contempt proceedings,
18 we just have the experts show up, and we cross-examine them.
19 We don't need to go through another mini trial on this.

20 So, you know, the 30(b)(6) deposition shouldn't be
21 limited to five topics. Our topics are about ten or 12. I'm
22 happy to send it to you. I'm happy to send it to the Court,
23 and we shouldn't be limited to four hours each on individual
24 depositions.

25 I need to cross-examine Mr. Hager on the

1 inconsistencies that he's made to the customers of Lawson as
2 well as what he said under oath to the Court, because those two
3 cannot be reconciled. I mean, he told us it was going to be
4 months and millions of dollars to change the infringing systems
5 out, and now it was a 20-minute download, and it's for free.
6 Those two cannot be reconciled. I shouldn't be limited to five
7 hours on this.

8 MR. SCHULTZ: Those can be reconciled because his
9 testimony was about completely changing out the Lawson system
10 to another vendor, not updating and taking out and removing
11 what ePlus considered to be an infringing configuration. They
12 are two completely different things, and your motion completely
13 mischaracterizes that.

14 MR. ROBERTSON: Let's assume you're right --

15 THE COURT: Whoa, whoa, whoa.

16 MR. ROBERTSON: Sorry, Your Honor. Let me just say

17 --

18 MR. SCHULTZ: Your Honor --

19 THE COURT: Wait just a minute. Let me tell you
20 something. I've got a few other things to do besides deal with
21 you all, and one of them is I'm leaving for a vacation, and I'm
22 going to be gone from the 4th to the 24th of October.

23 When I come back, I have a full schedule. I begin a
24 two-week trial in which the companion cases yielded a verdict
25 of \$220 million, and then that puts us to Thanksgiving, and

1 I've got about two more weeks and then I leave for Christmas
2 vacation and my visit with my grandchildren. So I don't have a
3 lot of time to be spending on this.

4 I want you to understand something, Mr. Schultz. I
5 don't know exactly what the discrepancies are, but I will tell
6 you when I read what I read that your client had said, I was
7 mightily distressed about it.

8 If they were working on something that simple and
9 that easy when they were telling me how hard it was and the
10 hardship it was going to be on all customers and everything,
11 all of the customer base and what a tragedy it was going to be
12 for the medical industry, and they were working on something
13 that was 20 minutes and easy to do and they didn't disclose
14 that, then I was misled, and I don't think the record in the
15 trial is right, and I'm frustrated about what I'm seeing.

16 Now, it may be that that can be harmonized, but I
17 want ePlus to have a full opportunity to harmonize it, because
18 if it is what I think it is, there are a number of people who
19 are in trouble.

20 MR. SCHULTZ: Your Honor, we have --

21 THE COURT: And I'm telling you, I want it dealt with
22 fully so that it can be appropriately dealt with.

23 MR. SCHULTZ: In fact, what I'm going to agree to do
24 here is I did not realize that ePlus was going to limit their
25 interrogatories and document requests to 15 and 12. What they

1 have provided to us before was in the 30 range. I'm okay with
2 those. You know, as long as they are asking reasonable
3 questions, we're going to respond to those. So right there, we
4 can take care of that right now.

5 Mr. Robertson, please provide me those document
6 requests and interrogatories. I would ask you that we'd have
7 until October 7th to respond to those. We'd like to be able to
8 deal with this brief. I'd like to be able to fully inform the
9 Court that there were hundreds of hours placed into the
10 requisition center product, that it wasn't this simple
11 20-minute download that's being represented.

12 It is a 20-minute download, but that's just to get
13 the software onto the computer. There's a whole lot of other
14 development, implementation that goes on to this. To take out
15 the download portion is completely irrelevant.

16 THE COURT: That's not the problem. You're not
17 telling your customers it takes hundreds of hours to do
18 anything, and I think what you're doing is conflating the time
19 you worked on things and the time it will take to actually
20 achieve the solution, and I want it sorted out.

21 And I want Mr. Weaver and ePlus to have full and
22 complete access in any way that they want it to be able to
23 understand exactly how this system works, and how, if at all,
24 it's different than the other system. And there are going to
25 be no limitations on that, because it's important --

1 MR. SCHULTZ: We provided all of the source code. We
2 provided them a demonstration -- I guess we can work with ePlus
3 on what else they want, but we provided them all the
4 information regarding the system itself.

5 THE COURT: You give them what they want.

6 MR. ROBERTSON: We respectfully disagree with that.

7 THE COURT: You give them what you want. Mr.
8 Robertson, you formulate what you want, and you submit it to
9 them, and unless there's something that is egregious, you give
10 it to them, Mr. Schultz, because there is enough information
11 right now to trouble the Court with respect to whether or not
12 what was said to the Court and what is being said to your
13 customers can be harmonized.

14 Now, they may be able to be harmonized, and I realize
15 you haven't even been heard on this issue yet, and I want to
16 hear what you have to say, but I want to hear what you have to
17 say, and the reason I asked for this call, with you being fully
18 knowledgeable that you have a job to do to explain to me the
19 apparent discrepancies and to understand that there are
20 concerns to be dealt with.

21 So, to that end, it is important that the plaintiff's
22 expert have access in the way the plaintiff has outlined. It
23 needs access to be able fully to deal with this at a hearing,
24 and I don't want -- we don't want to spend a great long time
25 getting ready for this hearing and have another trial over

1 something. And I don't want any situation to develop so that
2 there are fine distinctions being drawn that don't make any
3 difference. Do you understand what I'm saying, Mr. Schultz?

4 MR. SCHULTZ: Your Honor, I do understand what you're
5 saying. We will continue, as we have been, cooperating with
6 ePlus.

7 THE COURT: Well, let me tell you that the letters
8 that I saw from Mr. McDonald early in the year when this
9 exchange was going back and forth don't stand for cooperation
10 where I come from. They stand for fighting, the likes of which
11 I saw in the antecedent parts of this case that caused this
12 case to be delayed once, and that created problems, and I'm not
13 going to have that anymore.

14 Now, the other thing that I have in mind, I suppose
15 you're going to offer some kind of expert testimony, Mr.
16 Schultz, are you?

17 MR. SCHULTZ: Yes, we are, Your Honor.

18 THE COURT: Who is that going to be from?

19 MR. SCHULTZ: Dr. Shamos.

20 THE COURT: I want -- I don't usually do this, but
21 I'm of a mind that it might be appropriate in this instance for
22 there to be a court-appointed expert to look at this thing and
23 to help me with this given the circumstances which have arisen.

24 MR. SCHULTZ: Your Honor, this is Mr. Schultz, and I
25 would like to explore that.

1 THE COURT: Are you agreeable to it? Is that what
2 you mean?

3 MR. SCHULTZ: I'd like to talk with my client, but it
4 sounds like a good idea.

5 MR. ROBERTSON: Your Honor, this is Mr. Robertson.
6 Respectfully, we spent a lot of money on this case, and I
7 assume the Court would want us to share the expenses on that.
8 The Court has heard Dr. Shamos before, heard Dr. Weaver, can
9 make its own assessment of the credibility based on their
10 testimony and the evidence they'll be presenting.

11 I don't want to prolong this anymore. This company
12 was acquired for \$2 billion. The best offer they ever made to
13 us was \$87,000 to settle this case. My client is at their
14 wit's end with the money they've been spending on this
15 litigation.

16 We're now dealing with three appeals involving
17 another law firm that's taken over for Lawson, Finnegan
18 Henderson. I just anticipate deposition after deposition and
19 retrying this case.

20 THE COURT: What do you mean, three appeals?

21 MR. ROBERTSON: Well, there's two appeals from the
22 judgment as a matter of law by both parties, and there's an
23 appeal from the interlocutory order of the Court granting the
24 injunction.

25 THE COURT: That's not an interlocutory order.

1 That's a final order. I don't understand how the Court of
2 Appeals works on these things. This is silly.

3 MR. ROBERTSON: Your Honor, I can represent to you
4 and I can provide you with documents --

5 THE COURT: I'm finished with the case except for the
6 motion to modify the injunction and the attorneys' fees
7 request, exceptional case request as far as I can tell, and
8 that shouldn't hold up an appeal of the main part of the case.

9 MR. ROBERTSON: It's not holding up, but
10 notwithstanding -- we're asking the Federal Circuit to
11 consolidate the two appeals to the judgments as a matter of
12 law, and I think they will. There are still the ongoing
13 interlocutory appeal, and we're pressing that be consolidated
14 as well, so there is some sanity to the appellate process, Your
15 Honor.

16 THE COURT: Well, I certainly think it ought to be
17 consolidated, but that's not my business. However, what is
18 happening right here in this issue could very well be important
19 in resolving what's been said by Lawson in respect of its
20 claims concerning the propriety or not of an injunction,
21 because you have alleged -- I don't know if it's true or not --
22 you have alleged that the things that were said at the trial on
23 the issue of two factors, the harm to Lawson and the harm to
24 the public, were not true. Now, that's what your motion says;
25 isn't that right?

1 MR. ROBERTSON: Well, the Court ruled in our favor on
2 that. So what we're really saying, Your Honor, is that this
3 R2C design-around is not colorably different from what the
4 Court enjoined, and so therefore --

5 THE COURT: Wait a minute, Mr. Robertson. Yes,
6 that's your bottom line, but in getting there, you are
7 making -- the way I read your allegation, and you said as much
8 today, that the statements made by Mr. Hager and in the briefs
9 about whether or not -- about the facts on which two components
10 of the injunctive relief analysis were conducted in this Court
11 are not true. Now, aren't you saying that?

12 MR. ROBERTSON: Your Honor, yes, I am saying that.

13 THE COURT: Well, now, don't you understand that that
14 could have a significant impact on the analysis of that issue
15 by the Court of Appeals? And for that reason, I think it
16 appropriate to get this matter resolved as promptly as possible
17 as well as for the issue of contempt so that the Court of
18 Appeals has the full record on what is the truth with respect
19 to the factors that go into the analysis of injunctive relief,
20 whereas here, the alleged misrepresentations made to this Court
21 go to two of the four factors in the injunctive test.

22 MR. ROBERTSON: Your Honor, I'm not disagreeing with
23 you, sir. Let me say first on their appeal brief, which we
24 have already on the injunction, they don't argue any of the
25 eBay® factors such as the hardship or any of that. They just

1 go to the merits directly.

2 I can forward it to you, and the representation, I
3 believe, is at page 29 that they don't even have to deal with
4 the eBay® factors. Having said that, of course the credibility
5 of the witnesses during that injunction hearing with respect to
6 the hardship that was involved is going to speak volumes with
7 respect to whether or not they really have designed around
8 this.

9 Having said that, I want to return to Your Honor's
10 original suggestion which I just want to address again and
11 state my client's position, and that is, we just think -- we do
12 want as quick a resolution as possible, as Your Honor
13 suggested, and we think having an independent expert is just
14 going to slow this thing down until we are well past the end of
15 this calendar year.

16 The Court heard testimony before, is familiar with
17 the technology. We think we can brief it, we think we can do
18 whatever is necessary in order to get the information to the
19 Court so it can make its ruling. At this point, bringing in
20 somebody who has got to familiarize themselves and then divide
21 those costs among the parties, Your Honor, would be, quite
22 frankly, a significant hardship.

23 So I would urge you not to go that route if that's
24 your inclination. I mean, really, that would be my client's
25 preference. I'm happy to do the workout with Mr. Schultz, the

1 discovery schedule that's reasonable and fits the Court's
2 schedule given what you've informed us, but we want to move
3 forward on this as rapidly as possible.

4 MS. STOLL-DeBELL: Your Honor, it's Ms. Stoll-DeBell.
5 May I speak to this issue briefly?

6 THE COURT: Sure.

7 MS. STOLL-DeBELL: I personally think it would be a
8 very good idea for you to get an independent expert. We're
9 talking about contempt. ePlus is alleging that we are in
10 contempt, and that's a very serious thing.

11 We're talking about some complicated computer
12 software. We're going to be looking at source code issues,
13 because what Lawson did is look at the various features that
14 ePlus alleged and proved infringed their patent, and we removed
15 several of those features, something like four or five of them,
16 so that we would not be in contempt in doing the redesign and
17 so that we would no longer be infringing, and we believe that
18 we have done that.

19 Our client has had many different people working on
20 this and has spent hundreds of hours to actually change the
21 source code so that they have a viable redesigned product that
22 we do not believe infringes these claims anymore.

23 And I think that is really the heart of what we need
24 to and you need to decide, is this redesigned product more than
25 colorably different than what the jury found infringed, and if

1 it's not more than colorably different -- we think it is.

2 We spent a lot of time looking at it, and we think it
3 is, but let's say it's not. We still have to look at the
4 second issue which is, does it still infringe, and so I think
5 those are very complicated issues, and I tend to think it would
6 speed things up and make your job a lot easier to bring in an
7 independent expert to help you sort through these complicated
8 technical issues.

9 MR. ROBERTSON: Your Honor, this is Mr. Robertson.
10 Changing the name of shopping cart to requisition line is not a
11 complicated issue. It's like on your Microsoft Word, if you
12 changed recycle bin to trash can, it still does the same
13 functionality. I mean, this is -- these are cosmetic
14 changes --

15 MR. SCHULTZ: Mr. Robertson, I'll stop you right
16 there, because that's not what was changed. It was not just a
17 change of the name.

18 MR. ROBERTSON: Don't interrupt me, Mr. Schultz.

19 MR. SCHULTZ: You can't misrepresent things in front
20 of the Court.

21 MR. ROBERTSON: I've got affidavits I've presented to
22 the Court.

23 THE COURT: Mr. Schultz -- wait a minute, gentlemen.
24 Mr. Schultz?

25 MR. SCHULTZ: Yes, Your Honor.

1 THE COURT: You've been in this case before, haven't
2 you?

3 MR. SCHULTZ: Yes, Your Honor.

4 THE COURT: Hasn't everybody been given an
5 opportunity to have their say? Haven't you had the chance to
6 have your say when you needed to have it?

7 MR. SCHULTZ: Your Honor, I just thought it was the
8 appropriate time there.

9 THE COURT: Isn't the answer to that yes?

10 MR. SCHULTZ: Yes, Your Honor.

11 THE COURT: Yes. Then you please do not interrupt
12 when Mr. Robertson is talking, and he'll accord you the same
13 privilege and courtesy.

14 MR. SCHULTZ: I would appreciate that. Thank you.

15 THE COURT: I didn't understand what you said.

16 MR. ROBERTSON: I don't want to belabor this. We've
17 given you declarations based on review of the discovery we've
18 had. We want more discovery. I understand that the Court is
19 giving us leeway to provide reasonable discovery requests to do
20 that. I understand the Court has a schedule.

21 I'm going to work with Mr. Schultz and Ms.
22 Stoll-DeBell to work out a schedule. I'm probably amenable
23 right now, after I consult with my client, to give Mr. Schultz
24 to October 7th, I believe. I'd like that to be not only the
25 response but the actual production, and in the spirit of

1 cooperation, I'll agree to that right now without even
2 consulting with my client, although my client wants to move
3 forward as expeditiously as possible.

4 THE COURT: Let me say this: I don't want a bunch of
5 objections to discovery. The last time I had to deal with the
6 objections to discovery from Lawson, I found them to be
7 essentially -- I didn't find them to be very compelling, and it
8 was wasteful of my time to have to even deal with it, and it
9 wasted -- it slowed the process down. I don't want to have to
10 deal with that again, and I don't have time to deal with it,
11 and I'm not going to be here to deal with it during part of the
12 time, and all that's going to happen is, when I come back,
13 we're going to have a problem in terms of getting things
14 accomplished on a schedule, and I don't want that either.

15 So Ms. Stoll-DeBell, I do not expect to have any
16 recurrence of some of the objections, the kinds of objections I
17 had to deal with last time. I don't want that. And, Mr.
18 Robertson, I do want -- you can do this however you want to do
19 it, but I want to know and have developed -- I want to know and
20 understand exactly where along the way Lawson's product was
21 when various statements were made to the Court about how much
22 time it would take, how expensive it would be to deal with the
23 consequences of an injunction in the event of infringement. I
24 want that developed. I want to see what that record is.

25 That's part of what your mission is going to be here

1 given the nature of the charges you have made, because if you
2 have made charges that are not true on that regard, then you've
3 got a problem yourself. And I don't want to have to be in a
4 position of deciding any of these things on less than a good
5 record.

6 So that's part of your mission, and I'm sure Ms.
7 Stoll-DeBell and Mr. Schultz will work with you to give a good
8 record on all of that. And you can take such ever
9 reasonable -- I want you to go agree upon a reasonable
10 discovery schedule. I want you to present it to me next week
11 and have it all worked out about what you're going to do.
12 And -- and then -- have you posited interrogatories at this
13 stage, Mr. Robertson?

14 MR. ROBERTSON: I have drafts of them, and I'm
15 willing -- I can finalize them even probably this afternoon or
16 tomorrow morning and get them to Mr. Schultz. I think there
17 are reasonable --

18 THE COURT: I don't want them. You submit them and
19 you get them out so they can see where you are heading. Get
20 your document requests out as soon as you can and get a
21 schedule for compliance with them, and I really don't expect a
22 lot of objections to them.

23 MR. ROBERTSON: Yes, Your Honor.

24 THE COURT: It would be a serious mistake for Lawson
25 to take less than seriously the charges that have been levied,

1 and I want Lawson, therefore, to make sure that it develops
2 fully the answers to the question that I asked Mr. Robertson to
3 focus on.

4 MR. ROBERTSON: Clearly the timeline is something we
5 are focused on.

6 THE COURT: All right. So you all get back with me
7 early next week with a schedule.

8 MS. STOLL-DeBELL: Okay, will do, Your Honor.

9 THE COURT: Anything else that we need to deal with?
10 Meanwhile the briefing schedule is approved.

11 MR. ROBERTSON: Your Honor, the only other thing --
12 I'm reluctant to bring this up, but I just want to alert the
13 Court. We have some concern that there have been statements
14 made by Mr. Hager and others about opinions that they've
15 received from counsel as to this design-around, and we think
16 they've made disclosures to the customers that waive the
17 attorney-client privilege.

18 I just don't want to catch you blind-sided on that,
19 because I think that's going to come up. If there are opinions
20 of counsel, we think they should disclose them as to whether or
21 not this new design-around is allegedly non-infringing, and if
22 they don't agree to disclose them, I believe we are going to
23 press a waiver issue with respect to the fact that they have
24 disclosed to their own customers the results of that attorney
25 advice.

1 THE COURT: You know how to present that. You posit
2 your interrogatories to call for them, your document request to
3 call for them. Their responses will object or not object, and
4 they have to do it with sufficient specificity of any claim of
5 privilege to permit you to assess the validity vel non of the
6 privilege. That's all in the local rules and in the federal
7 rules and in the case law, and then a proper motion to compel
8 production based on whatever theory you have has to be filed,
9 and I'll deal with it as promptly as I can.

10 I think it needs to be teed up with the proper
11 background and responsibility. I did, in fact, see an allusion
12 to that in the briefs that I read, so I have expected that it
13 will come. I assume you will tee it up just as promptly as
14 possible if you feel like it's apt.

15 MR. ROBERTSON: Understood, sir. Thank you.

16 THE COURT: Is there anything else that needs to be
17 done? If you all both, upon reflection, think that it's a good
18 idea for me to appoint a court-appointed advisor, I will
19 solicit from each of you the names of three people, and then
20 we'll go from there.

21 I haven't made a decision, and I am mindful, Mr.
22 Robertson, that your client is not in the same economic league
23 as Lawson, and I will -- I understand your problem, and I will,
24 in fact, deal with that.

25 There have been cases, I believe, but I'm not sure,

1 I'd have to look, where I would require the entity that
2 supports it, if you oppose it, to pay for it up front and then
3 allocate it out at the end of the matter depending upon the
4 outcome.

5 Frankly, I don't know where it's a court-appointed
6 expert, I don't know whether, in fact, that is a permissible
7 approach or not, and my recollection is that there has to be an
8 insulating mechanism so the expert doesn't know who is paying
9 the fee, if I remember how the order structure went, but that's
10 something you all can look into, too, and then you can advise
11 me further on that after you've had an opportunity to think
12 about it.

13 But I am mindful of the financial consequences to
14 your client, and you did prevail and you are entitled to some
15 consideration in an effort to make sure that your victory is
16 not a hollow one. All right. Is that it folks?

17 MR. MERRITT: Judge Payne, this is Craig Merritt.
18 You asked early on in the conversation how we anticipated the
19 Court would proceed after the initial briefs are filed. It may
20 be implicit in everything that's been said, but I'm assuming
21 what I'm hearing is that once the opposition is filed and the
22 reply is filed, the decision to issue a show cause can be
23 decided on the briefs without further submission?

24 THE COURT: Unless I ask for it, yes.

25 MR. MERRITT: Thank you, Judge.

